PD-0041-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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**No. PD-0041-17**

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In the

**COURT OF CRIMINAL APPEALS**

of the

**STATE OF TEXAS**

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**THE STATE OF TEXAS, Petitioner**

*v.*

**REX ALLEN NISBETT, Respondent**

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# RESPONDENT'S MOTION FOR RECONSIDERATION EN BANC[1]

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## *Background*

On March 21, 2013, Respondent was indicted for the felony offense of murder alleged to have been committed on December 14, 1991.[2] On June 11, 2014, a jury found Respondent guilty and assessed his punishment at forty-two

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[1] Simultaneous with this filing, Appellant has also filed a Motion for Rehearing pursuant to Texas Rule of Appellate Procedure 49.1 and *Franks v. State*, 97 S.W.3d 584, 584 (Tex. Crim. App. 2003).

[2] The two previous Williamson County District Attorneys reviewed this case and declined to prosecute because of a lack of evidence.

years in prison.[3] On December 15, 2016, the Third Court of Appeals reversed Respondent's conviction and sentence and rendered an acquittal.[4] *Nisbett v. State*, No. 03-14-00402-CR (Tex. App.—Austin, delivered December 15, 2016) (not designated for publication). The State Prosecuting Attorney's Office filed a Petition for Discretionary Review on February 21, 2017. Respondent timely filed a Response to the State Prosecuting Attorney's Petition for Discretionary Review on March 2, 2017. On July 26, 2017, this Court granted the State Prosecuting Attorney's Petition for Discretionary Review. On June 27, 2018, this Court issued an opinion reversing the Third Court of Appeals' opinion and acquittal of Respondent. No. PD-0041-17, *Rex Nisbett & George Delacruz v. The State of Texas*[5] (Tex. Crim. App.—Delivered June 27, 2018).

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[3] This case was tried by Jana Duty, the former Williamson County District Attorney who has since been disciplined by the State Bar for her conduct in another capital murder case. This case was Ms. Duty's first felony trial.

[4] The opinion was authored by Justice Melissa Goodwin, a Board Certified Criminal Law Specialist and former Staff Attorney at the Court of Criminal Appeals.

[5] The Opinion refers to Rex Nisbett as an "Appellant," when in fact, he was the Respondent in his cause. Mr. Nisbett's case should actually have been designated as *The State of Texas, Petitioner v. Rex Nisbett, Respondent.*

## *Ground for Reconsideration*

### I. This Court's opinion ignores the legislatively-enacted requirements for proving the offense of murder in the State of Texas.

In this Court's opinion, after a lengthy discussion of the "facts" of the case, the Court reversed Respondent's acquittal. In so doing, the Court inexplicably joined Respondent's case with the case of another individual that Respondent has never met and whose case has no links to Respondent's. In fact, the two cases are from separate counties and the offenses were alleged to have been committed some twenty years apart. The Court joined these two cases even after acknowledging that "a sufficiency of the evidence inquiry is highly individualized." *Nisbett & Delacruz* at 31.

Nonetheless, this Court surmised that "[i]n both cases, there was no eyewitness to murder, no confession by the defendant to murder, no body recovered, and no murder weapon found." *Nisbett & Delacruz* at 30. Texas Penal Code Section 19.02 requires that the State prove beyond a reasonable doubt that a defendant intentionally or knowingly caused the death of an individual or committed an act clearly dangerous to human life which resulted in the death of an individual. *See* TEX. PENAL CODE § 19.02. In its opinion reversing Respondent's conviction and rendering an acquittal, the Third Court of Appeals found:

> After reviewing all of the evidence in the light most favorable to the verdict, we hold that the cumulative force of all of the circumstantial evidence presented in this case and any reasonable inferences from that evidence merely raised suspicions of appellant's guilt and are insufficient to support a finding beyond a reasonable doubt that appellant committed the murder as alleged in the indictment.

*Nisbett v. State*, No. 03-14-00402-CR at 38-39.

Disregarding the Third Court of Appeals' thoughtful and careful consideration of the evidence, the State Prosecuting Attorney argued in its Brief to this Court that motive, opportunity and suspicion are sufficient to support a murder conviction. Specifically, the State Prosecuting Attorney argued that Respondent was guilty of murder because:

> Appellant said he would kill his wife if she tried to leave him and take the kids. She left him and took the kids. Already unhappy about the pending divorce, he was more upset when he found out she began dating. It came to a head that day. Appellant did not want her to go out or to talk to her girlfriend, and he choked her after she spoke with the man she started dating. What exactly happened next is unknown, but she bled enough for it to soak through the closet carpet and cover appellant's hand (at least). [6] He then borrowed a neighbor's car, jimmied the trunk lock, and brought it back after an hour and a half looking like it had driven through the woods.

*See* State Prosecuting Attorney's Brief at 36.

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[6] To the contrary, DPS Analyst Burgett testified that the blood samples she analyzed were so small, she could not see some of them and the stain submitted from the carpet contained the DNA of two females.[6] (RR11: 140, 157-60). Also, she could not exclude Respondent as a contributor to the sheetrock sample which contained a handprint, but statistically, she could not say that Respondent was the contributor of the DNA profile found on that sample beyond a reasonable degree of scientific certainty. (RR11: 149-50).

The State Prosecuting Attorney actually admitted it is "unknown" what happened to Vicki. *See* State Prosecuting Attorney's Office at 36. Respondent warned of the dangerous practice of employing suspicion and speculation as "evidence" in a murder case in his brief to the Court by stating, "If the State Prosecuting Attorney is seeking to lower the burden of proof in murder cases, it must do so at the Legislature, not through this Court. *See* TEX. PENAL CODE § 19.02." *See* Respondent's Brief at 22.

Respondent continued, "The State Prosecuting Attorney's willful and intentional disregard for the statutory requirements for proving the offense of murder is no less than frightening" where the State Prosecuting Attorney glaringly concedes that it is unknown what actually happened to Vicki Nisbett. *See* Respondent's Brief at 28-29.

The Court of Criminal Appeals has now adopted the State Prosecuting Attorney's argument in a published opinion which lessens the burden of proof in a murder case in violation of the legislatively-mandated statutory requirements for proving the offense of murder. With all due respect, the Court has legislated from the bench by stepping into the shoes of the legislature in enacting a new burden of proof for the offense of murder in the State of Texas.

This is particularly troubling considering that, in a recently-filed, public document, the State Prosecuting Attorney announced that she is "within the

'judiciary'" because of both her "proximity and service" to the Court of Criminal Appeals. *See* State Prosecuting Attorney's Response to Rule 12 Appeal No. 18-005. The State Prosecuting Attorney separated herself from other prosecutors by pointing out that she was "selected by the CCA" and her "position is different from all other advocates." *See Id.* She continued that "The SPA's Authority Trumps a District Attorney's Before the CCA." *See Id.* at 9. These statements suggest that the State Prosecuting Attorney views herself as an arm of the Court of Criminal Appeals, rather than "all other advocates." This is especially evident when you consider that the local, elected District Attorney in this case chose not to pursue a Petition for Discretionary Review and expressed his choice to the State Prosecuting Attorney.

Since the Court of Criminal Appeals traditionally does not engage in a factual sufficiency analysis on discretionary review, one can assume that the Court did so in this case only to announce the new standard of proof in murder cases at the request of the State Prosecuting Attorney. If the State Prosecuting Attorney is a member of the "judiciary" who advocates on behalf of the Court of Criminal Appeals, every defendant in the State of Texas is impacted by this apparent conflict of interest and the integrity of the entire criminal judicial system in Texas is in jeopardy.

Additionally, this Court's analysis of the "facts" of this case is nothing more than a recitation of the State Prosecuting Attorney's interpretation of those "facts." For example, this Court's opinion states, "[i]n both cases, the victim disappeared, never to be seen or heard from again." *Nisbett & Delacruz* at 30. However, in Respondent's case, that is simply not true. Kelly Misfeldt testified that on December 29, 1991, he saw Vicki outside of her apartment more than two weeks after she allegedly disappeared. (RR9: 8-9). Misfeldt specifically remembered that Vicki was wearing a black jacket and black pants. (RR9: 11). Misfeldt was unequivocal that he saw Vicki's face and was "99 percent sure that it was her." (RR9: 17). Misfeldt maintained his assertion for over twenty years. (RR9: 17).

Next, this Court's opinion related, "Vicki's blood had soaked through the carpet and into the carpet padding. That fact suggests that Vicki lost a lot of blood—suggesting that her wounds were fatal." *Nisbett & Delacruz* at 34. This Court continued, "Even though we do not know how Vicki died, the evidence shows that she lost a lot of blood." *Nisbett & Delacruz* at 39. But, at trial, Texas Department of Public Safety DNA analyst Jane Burgett stated that the amount of blood found in Respondent's apartment was "very hard to see" and that there was not enough blood to indicate a person had died. (RR11: 160). Further, Burgett could not testify that a crime occurred in this case or that Respondent committed an intentional act. (RR11: 160, 170).

The Court also pointed to the lack of a digital footprint in "today's mobile and technological society" as evidence that Vicki Nisbett is no longer alive. *Nisbett & Delacruz* at 34. What the Court ignores is that Vicki Nisbett allegedly disappeared more than twenty-five years ago when there was no "mobile and technological society." The Court's assumption is at odds with the State's own witness, Heidi Prather of the Missing Persons Clearing House, who testified at trial that her organization is still actively looking for Vicki and that she does not know if Vicki is dead or alive. (RR11: 66-68). The Court's assumption also seems to justify the principle that the absence of evidence amounts to evidence; another dangerous practice in a murder case.

This Court's opinion in Respondent's case ignores the elements of the offense required to be proven in a murder case as set out by the Texas Legislature. Further, for the reasons set forth in Respondent's brief, the evidence in this case is insufficient to support Appellant's conviction and sentence. Therefore, rehearing should be granted.

## PRAYER

**WHEREFORE, PREMISES CONSIDERED,** Appellant respectfully requests that this Court grant reconsideration in this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion for Reconsideration En Banc was served by efile to John Messinger, john.messinger@spa.texas.gov, at the State Prosecuting Attorney's Office, on July 12, 2018.

Kristen Jernigan

## CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the foregoing document consists of 1,887 words in compliance with Texas Rule of Appellate Procedure 9.4.

Kristen Jernigan